IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1610

CECIL PENDLETON, ... APPELLANT,

VS:

BEE PENDLETON, CALLIE
SHERROW PENNINGTON,
JACK PENDLETON,
W. G. PENDLETON,
MARATHON OIL COMPANY,
CARROLL G. COLE and
I. W. SMITH, and
QUALI CON, INC., ... APPELLEES.

ON APPEAL FROM THE SUPREME
COURT OF THE COMMONWEALTH OF KENTUCKY

JURISDICTIONAL STATEMENT

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No. _____

CECIL PENDLETON, ... APPELLANT,

VS:

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JURISDICTIONAL STATEMENT

OPINIONS BELOW-1 (a)

The opinion of the Supreme Court of Kentucky from which this appeal is taken, is officially reported

in 531 SW2d 507 and is printed in full in Appendix A, hereto.

The unreported opinion of the trial court, the Circuit Court, 22nd Judicial District, First Division, in and for Fayette County, Kentucky, (Fayette Circuit Court, Civil Action No. 31840), rendered the 9th day of August, 1972, is reprinted as Appendix B, hereto.

JURISDICTION-1 (b)

(i)

The nature of the proceeding is an appeal by Cecil Pendleton, the illegitimate son and only child of Cornelius Pendleton, intestate, seeking to recover certain assets, including real estate from the Appellees, Bee Pendleton, Callie Sherrow Pennington, Jack Pendleton and W. G. Pendleton, some being claimed heirs of the intestate Cornelius Pendleton and the Appellees, Marathon Oil Company, Carroll G. Cole, I. W. Smith and Quali Con, Inc., holders of real property, the same having been owned by the intestate, Cornelius Pendleton, at his death in 1966.

The Appellant, Cecil Pendleton, contended in his pleadings, contended on appeal to the Supreme Court of Kentucky and contends here, that K.R.S. 391.090(2) violates the Equal Protection Clause of the 14th Amendment to the United States Constitution.

K.R.S. 391.010 (Kentucky's intestate succession statute regarding real estate[1]) provides:

> "When a person having right or title to any real estate or inheritance dies intestate as to such estate, it shall descend in common to his kindred, male and female, in the following order, except as otherwise provided in this chapter:
>
> (1) To his children and their descendants. . . ."

Otherwise provided in Chapter 391, is K.R.S. 391.090(2), the statute which Appellant contends violates the Equal Protection Clause. K.R.S. 391.090 (2) provides:

> "(2) A bastard shall inherit only from his mother and his mother's kindred."

Under Kentucky's statute, then, an illegitimate child inherits from his intestate mother exactly as legitimate children do, but an illegitimate child is barred absolutely from inheriting from his intestate father.

(ii)

The date of the judgment or decree sought to be reviewed and the time of its entry is February 6, 1976.

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1. Personal property descends, basically as real property. K.R.S. 391.030.

The order denying Appellant's Petition for Rehearing was entered February 6, 1976.

Notice of appeal to this court was filed on April 2, 1976, in the Supreme Court of Kentucky. The Appellees, Callie Sherrow Pennington and Quali Con, Inc., are not represented. However, such parties were given notice of this proceeding by the Notice of Appeal filed in the Supreme Court of Kentucky on May 3, 1976.

(iii)

The statutory provision believed to confer on this court jurisdiction of the appeal is 28 USC §1257(2), which permits this court to review, by appeal, the judgment of the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constiution . . . of the United States, and the decision is in favor of its validity."

(iv)

Among the cases believed to sustain jurisdiction is *Levy* v. *Louisiana*, 391 U.S. 68, (1968).

(v)

The statute of the Commonwealth of Kentucky, the validity of which is challenged, is an exception to the Descent and Distribution statute, pertaining to intestate succession. It is K.R.S. 391.090(2), and is text is as follows:

> "(2) A bastard shall inherit only from his mother and his mother's kindred."

It may be found in Volume 14, Page 109 of the official edition of the Kentucky Revised Statutes (1972).

A copy of the judgment or decree, and the order denying Appellant's Petition for Rehearing are included in the Mandate issued by the Supreme Court of Kentucky on February 6, 1976, is appended hereto, as Appendix C, hereof.[2] A copy of the notice of appeal is appended hereto, as Appendix D & D_1, hereof.

QUESTION PRESENTED-1 (c)

Does the Kentucky statute [K.R.S. 391.090(2)] which prohibits an illegitimate child from inheriting from his intestate father, violate the Equal Protection Clause of the 14th Amendment to the United States Constitution, where such statute permits illegitimates to inherit from their intestate mothers, as legitimate children do?

STATEMENT OF THE CASE-1 (d)

On September 29, 1956, the Appellant, Cecil Pendleton was born out of lawful wedlock to Bethel Rawlins and Cornelius Pendleton, in Lexington,

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2. Appellant's motion, to the Supreme Court of Kentucky to prosecute the appeal there in his own name, was sustained on grounds of his having reached majority. The Mandate was erroneously captioned, but corrected.

Fayette County, Kentucky. The relationship of the Appellant's parents was that of "common-law" marriage partners. Common-law marriages are not valid in Kentucky.

In 1959, the Appellant's mother, Bethel, brought a bastardy proceeding against Cornelius Pendleton, wherein the Fayette County Court adjudged Cornelius to be the father of the Appellant, Cecil Pendleton. An appeal was taken to the highest court in Kentucky from that adjudication, and the finding of paternity was affirmed in *Pendleton* v. *Comm. of Ky., ex rel. Rawlins,* Ky., 349 SW2d 832 (1961).

Thereafter, in March, 1966, Cornelius Pendleton died, unmarried, intestate and leaving only one child, this Appellant, age 9 years. Shortly, thereafter, an administrator of the estate of Cornelius Pendleton was appointed, and the assets of the estate distributed to persons other than this Appellant.

Thereafter, while this Appellant was still under the disability of minority, he filed the action which led to this appeal in Fayette Circuit Court, by his next friend, seeking to recover the assets of his father's estate, or their value.

Under Kentucky's law of descent and distribution (K.R.S. 391.010), the net estate of a person who dies intestate, without a living spouse, descends totally to his "children and their descendants."

In the pleadings in the action which led to this appeal, the Appellant asserted that K.R.S. 391.-090(2) was unconstitutional as denying him equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

The trial judge passed upon the question adversely to this Appellant by opinion, Appendix B, hereto, holding that K.R.S. 391.090(2) was constitutional, and that Appellant's complaint did not state a claim upon which relief could be granted.

No assignment of error is necessary[3] to raise an appealable issue in the highest court of appellate jurisdiction in Kentucky. The federal question sought to be reviewed, here, was raised, again, in the Supreme Court of Kentucky, as is the procedure in Kentucky, as one of three[4] "Questions Presented" in Appellant's Brief to the Supreme Court of Kentucky.

Both the trial court, and the Supreme Court of Kentucky, each in the final paragraph of their respective opinions, Appendix B, and Appendix A, hereto, respectively, in upholding the constitution-

3. Kentucky Rules of Civil Procedure, Rule 75.04.

4. The other two questions were "state" questions. One pertaining to venue, and the other the status of Appellant under certain Kentucky statutes, by reason of his parent's "common law" marriage. He was held to be illegitimate under Kentucky law.

ality of K.R.S. 391.090(2) held that the law of *Labine* v. *Vincent*, 401 U.S. 532 (1971) controlled.

Labine, supra, upheld the constitutionality of a Louisiana inheritance statute which places illegitimates, *as a class*, below legitimates, *as a class*, in the order of intestate succession.

The Supreme Court of Kentucky, reluctantly upheld the constitutionality of K.R.S. 391.090(2), and was willing to undertake to distinguish Labine, supra, as urged by the Appellant in his Brief. Pertinent quotations of that Court's holding (Appendix A) are as follows, at 531 SW2d 507, 510:

"In *Labine* v. *Vincent*, 401 U.S. 532 (1971), the Supreme Court of the United States held by a 5-4 vote that a state law (Louisiana) barring an illegitimate child from inheriting from its father equally with legitimate children has a rational basis and does not violate the equal protection clause of the 14th Amendment. By a *per curiam* opinion joined in by seven of its members the same court in *Gomez* v. *Perez*, 409 U.S. 535 (1973), held that Texas statutes giving legitimate children an enforceable right of support against the father but not extending the same right to illegitimate children were discriminatory and denied to illegitimate children the equal protection guaranteed by the 14th Amendment.

In *Gomez* no reference was made to *Labine*. It was observed, however, that in the areas of

wrongful death and workmen's compensation it had been settled by previous decisions that 'a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.' Cf. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1971). . . ."

"It is readily apparent that the meaning of the equal protection clause cannot be ascertained from what it says, nor even from what the Supreme Court has said about it. As in Regina v. Ojibway* a pony was found to be a small bird, so under the 14th Amendment an illegitimate child may be either a speckled bird or a jackass, depending on its current aspect as (and when) viewed by the keeper of the royal secrets of the Constitution. Indeed it appears that here is a corner of the world Alice in Wonderland would not find unfamiliar.

From time immemorial the law of this state has recognized and enforced the responsibility of a father for the support of his illegitimate child, notwithstanding the vicissitudes of proof. Since it is now held by the court of last resort in the federal constitutional field that a child's right of support from its father is within the coverage of the equal protection clause and, if accorded to legitimate children in general, must be accorded to illegitimate children as well,

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*Reprinted by permission in Stevens v. City of Louisville, Ky., 511 SW2d 228, 230-231 (1974).

it would be our inclination to hold that although a right of inheritance may not have the immediacy or social significance of a present need for support, yet a right is a right, the existence of which surely ought not to depend on whether it falls within the ambit of state-enforced welfare legislation. If a state cannot constitutionally force a father to support his children without including illegitimate children, we can find no justification in logic for its authority to deny illegitimate children the same right of inheritance conferred upon other children. Though the right has something of a fugitive nature in that the father may of course discriminate against any child, legitimate or illegitimate, it seems incongruous that the state should be allowed to do it for him. But after all, this is mere logic, which seems to have a declining importance in the world of constitutional jurisprudence.

We are equipped with neither a crystal ball nor the type of scales on which it is evident that a right must be weighed in order to determine whether it is heavy enough to register under the 14th Amendment. Nor are we willing to undertake the sophistry of distinguishing *Labine* v. *Vincent*, 401 U.S. 532 (1971). Suffice it to say that it has not been overruled by the court that has the exclusive power to overrule it, and we think that as long as it remains the law it governs this case."

The highest court of Kentucky having decided in favor of validity, a statute of Kentucky having

been drawn in question as being repugnant to the Constitution of the United States, jurisdiction by appeal, is conferred on this court by 28 USC § 1257(2).

The Constitutional provision involved is the portion of the U.S. Constitution, Amendment XIV, Section 1, which provides:

> " . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

SUBSTANTIAL FEDERAL QUESTION-1 (e)

The constitutionally prohibited denial of equal protection of the laws of which this Appellant complains is simply that the Kentucky statute [K.R.S. 391.090(2)] discriminates *within* the class of persons called illegitimates. In relying on Labine, supra, neither the trial court, nor the Supreme Court of Kentucky recognized the significant distinction urged by Appellant, between the Louisiana statute and the Kentucky statute. In Louisiana, all illegitimates are treated equally. They cannot inherit from either mother, or father, as legitimates do. Further, under Louisiana Civil Code (1870) Art. 919, acknowledged illegitimates inherit (only to the exclusion of the State) if the intestate father left no surviving descendants, ascendants, collaterals or wife.

Under Kentucky's statute [K.R.S. 391.090(2)], however illegitimates inherit from their mother's

estate (assuming intestacy) equally and on the same basis as legitimate children, but are barred, absolutely, from ever inheriting from the estate of an intestate father.

Since 1968, this Court has decided several cases dealing with the constitutionality of various state statutes which treat legitimates, *as a class*, differently from illegitimates *as a class*. Most of the statutes were held to be unconstitutional.

In *Levy* v. *Louisiana*, 391 U.S 68 (1968), the state statute which prohibited illegitimates from bringing an action for the wrongful death of a parent was held constitutionally impermissible. The statute, likewise, in *Glona* v. *Amer. Guar. and Liab. Ins. Co.*, 391 U.S. 73 (1968), was striken down for prohibiting a parent from bringing an action for the wrongful death of an illegitimate child.

Weber v. *Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972), decided after Labine, supra, held that Louisiana's workmen's compensation law which relegated acknowledged illegitimate children to a lesser status than legitimate children, whereby the illegitimates received nothing for the work-connected death of their father, constituted a denial of equal protection.

Gomez v. *Perez*, 409 U.S. 535 (1973) held that to give an enforceable right of support by statute to legitimates against their father, without extending

the same right to illegitimates denied equal protection of the law to the latter, and was unconstitutionally discriminatory.

No case can be found by this Appellant, which held it to be constitutionally permissible for the state, by statute, to treat persons *within* the class designated as illegitimates, differently.

Perhaps, the state-drawn classification of legitimate children and illegitimate children may be rationally related to some lawful purpose of the state. See *Morey* v. *Doud*, 354 U.S. 457 (1957). Perhaps, not. But, in any event, it cannot be said that any lawful purpose of the state is served by dividing the class of illegitimate children into sub-classes for inheritance purposes, whereby one sub-class inherits from the female parent, as legitimates do, while the other sub-class may take nothing, whatever, from the male parent.

The substantial state interests relied upon so heavily in Labine, supra, that is, of strengthening family life and the stability of land titles and a prompt determination of ownership of property, are utterly defeated by the Kentucky statute itself. In that the statute permits some illegitimates to inherit as legitimates do, the title to every piece of land in Kentucky is suspect, if a woman died intestate, owning it.

Having granted the right of inheritance to an illegitimate child of an intestate woman, equally with legitimates, Kentucky cannot rationally (or constitutionally) withhold that right from an illegitimate child of an intestate man.

To suggest that it is easier to prove that a person is the illegitimate child of a dead woman, than it is to prove that he is the illegitimate child of a dead man, is pure speculation, in any given case. In any event, such speculation cannot provide the rationale for Kentucky's discriminatory statute. See Glona, supra, 391 U.S. 73, 76. Mr. Justice Brennan in his dissent in Labine, supra, 401 U.S. 532, 557, notes that Kentucky, Hawaii and Pennsylvania expressly provide by statute that an illegitimate child may not inherit from his father. Somehow overlooked was Ohio which, by statute provides that illegitimate children can take from and through the mother as if born in lawful wedlock. (Ohio, R.C. 2105.17).

In *Green* v. *Woodward*, Ohio, 318 N.E.2d 397 (1974), the Court of Appeals of Ohio held that its statute constituted "invidious discrimination" and violated the 14th Amendment to the U.S. Constitution in that it allowed *some* illegitimate children to be treated as legitimate for inheritance purposes and did not allow *all* to so inherit. The Court, at page 405, distinguished Labine:

> "At first blush it would appear that *Labine* controls the decision in this case, but on closer scrutiny, it is noted that this case can be distinguished from *Labine* on two bases — (1) the Louisiana state statute of descent and distribution is substantially different from the Ohio statute. In Louisiana bastards cannot inherit from and through either the mother or father the same as legitimate children, La.Civ. Code Ann., Art. 920 (West, 1952). Further, Louisiana does not treat any illegitimate the same as a legitimate. In Ohio, R.C. 2105.17 provides that illegitimate children can take from and through the mother as if born in lawful wedlock; (2) the United States Supreme Court decided *Labine* on the basis that discrimination between legitimates and illegitimates in the statute of descent and distribution was a reasonable classification and not invidious discrimination in violation of the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution. Ohio makes a distinction within the class of children it terms illegitimate."

In striking down its statute, the Ohio Court of Appeals in Green, supra., at page 406, went on to hold:

> "It is especially noted that there are two types of discrimination. There is discrimination between the classes, such as between legitimate children and illegitimate children, which was the issue decided in *Labine*. There is also dis-

> crimination within the class between various types of illegitimates, such as those illegitimates inheriting from and through the mother, and those inheriting from and through the father. It is this latter intra-class discrimination that is under attack in this case."

Hawaii, Pennsylvania, Ohio and Kentucky, by statute, provide that an illegitimate child may not inherit from his father, but Ohio in Green, supra, has striken down its statute as being an unconstitutional denial of equal protection under the 14th Amendment. Kentucky, having upheld its statute as not being constitutionally impermissible (albeit reluctantly), a substantial federal question is presented, so as to require plenary consideration by this court, with briefs on the merits and oral argument, for its resolution.

For the reasons given that the Kentucky statute is not rationally related to any lawful purpose of the state, and by reason of the disagreement of state courts in determining the applicability to similar state statutes under the equal protection clause of the 14th Amendment to the United States Constitution, this court, it is respectfully submitted, ought to note probable jurisdiction.

Respectfully submitted,

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Counsel for Appellant

APPENDIX

APPENDIX A

RENDERED: October 3, 1975

COURT OF APPEALS OF KENTUCKY
F-313-72

CECIL PENDLETON, by his next friend, WILLIAM F. GADD — APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HON. JAMES PARK, JR., JUDGE
CIVIL ACTION NO. 31840

BEE PENDLETON, ET AL — APPELLEES

OPINION OF THE COURT
BY JUSTICE PALMORE

AFFIRMING

Cecil Pendleton, an infant proceeding by next friend, brought this action in the Fayette Circuit Court to pursue certain assets, including real estate located in Fayette County, theretofore disposed of by the administrator and apparent heirs and distributees of Cornelius Pendleton, who had died intestate a resident of Garrard County. The gist of Cecil's claim is that he was Cornelius Pendleton's only child and sole heir and distributee. He appeals from a judgment dismissing the action.

According to the record, Cecil is the natural child of Cornelius by Bethel Rawlins. He was born in 1956. In a bastardy proceeding brought in 1959 the Fayette County Court adjudged that Cornelius was the father and directed that he support the child. A breach of promise suit brought in 1960 by Bethel Rawlins against Cornelius in the Fayette Circuit Court was dismissed pursuant to a jury verdict finding that when the alleged promises of marriage were made Bethel was already married to one Arnold Wasson. Cornelius died in 1966. He was unmarried and except for Cecil had no children.

The complaint consisted of two counts. Count 1 asserted a claim against the administrator, his surety, and the persons to whom the administrator allegedly had distributed the assets of the estate, and it demanded a redistribution. Count 2 alleged that the defendants other than those named in Count 1 had become the record owners of real estate in Fayette County owned in fee simple by Cornelius Pendleton at the time of his death, and it demanded that Cecil be adjudged the owner of this property or that he recover its value from the respective defendants holding record title.

By an amended complaint Cecil alleged that two of the distributees, a brother and a nephew of Cornelius, had executed and caused to be recorded in the office of the Fayette County Court Clerk a false affidavit or affidavits of descent purporting to show

the heirs of Cornelius Pendleton, knowing such information to be false, that Cecil was thereby damaged in that the affidavits were relied upon in effecting transfers of the property, and that the affiants were liable for such damages pursuant to the penalty provisions of KRS 382.990 (2).

The trial court determined that as to the administrator and distributees the venue of the action was improper because KRS 452.415 and 452.420 required it to be brought in Garrard County. The suit was thereupon dismissed as to them, but as against the purchasers of real estate in Fayette County venue was held proper under KRS 452.400.

We are of the opinion that the trial court was correct in adjudging that KRS 452.415 and 452.420 require the kind of action stated in Count 1 to be brought in the county in which the personal representative qualified, which in this instance was Garrard County. Cf. *Fleece* v. *Shackelford*, 204 Ky. 841, 265 SW 460 (1924).

The allegations of the amended complaint with reference to the affidavits of descent presented an entirely new and different cause of action from that stated in Count 1, and it may be that by virtue of KRS 452.460(1) the venue of such an action would lie in Fayette County on the theory that it was there that the injury was done. We need not so decide, however, because we are of the opinion that in any

event the facts alleged in the complaint and amended complaint negate the existence of a cause of action under KRS 382.990 (2). Hence the defendants in question were entitled to a dismissal pursuant to their defense that the amended complaint failed to state a claim upon which relief could be granted. Our conclusion in this respect is founded on the premise that the only possible basis for Cecil's claim of heirship is that KRS 391.090 (2), which provides that a "bastard shall inherit only from his mother and his mother's kindred," violates the equal protection clause of the 14th Amendment and that an illegitimate child must be accorded the same rights of inheritance as a legitimate child. The affidavits in question were executed and filed in 1966, at which time the state of the law was such that the affiants could not possibly have been charged with knowledge that an illegitimate child in this state would be held an heir of its father. For this reason they could not have been guilty of any actual fraud.

Turning now to the remaining aspects of the litigation, we concur in the trial court's conclusion that venue of an action to recover real estate through assertion of a hitherto-unrecognized heirship is laid by KRS 452.400 (1) in the county in which the land or some part of it is situated. The precedents cited by appellees to the contrary do not support their position. Some of them did not involve

real estate, and those that did were cases in which the object of the litigation was to partition, or to sell and divide the proceeds from, land held jointly by inheritance or devise. "An action for the partition of the real estate of a deceased person, under section 66 of the Civil Code [KRS 452.420] must be brought in the county in which the personal representative qualified." *Boreing* v. *Melcon,* 159 Ky. 14, 166 SW 612 (1914).

It is significant to note that subsections (2) and (3) of KRS 452.400, which cover suits for partition or sale of real property, specifically exclude actions covered by KRS 452.420, whereas there is no such exception to subsection (1).

Cecil's claim as the heir of his father is made in the alternative, as follows:

KRS 391.100 provides (1) that the issue of an incestuous marriage is not legitimate and (2) that "the issue of all other illegal or void marriages is legitimate." Cecil alleges that he was born during the existence of a common-law marriage between his mother and father which, though prohibited and void by virtue of KRS 402.020 (4), was a marriage within the terms of KRS 391.100 (2). If, on the other hand, it be held otherwise, he contends that under the equal protection clause of the 14th Amendment he is entitled to inherit from his father regardless of KRS 391.090 (2).

The child of a common-law marriage entered into in a state that permits such marriages is legitimate in this state even though for some reason the marriage was void in the first instance. Cf. *Copenhaver* v. *Hemphill*, 314 Ky. 356, 235 SW 2d 778 (1951). But in this state there is no such thing as a common-law marriage. What might be a common-law marriage somewhere else is no marriage at all here. As distinguished from being "void" or illegal" it simply does not exist as a "marriage" of any kind. We construe KRS 391.100 (2) as referring to a marriage that to outward appearances would substantially comply with the legal requirements of a marriage in the state in which it is performed. Cf. *Helm* v. *Goin*, 227 Ky. 773, 14 SW 2d 183, 185 (1929).

The trial court held that the 1959 county court judgment in the bastardy proceeding was *res adjudicata* to Cecil's claim of legitimacy in this proceeding. We express no opinion in that respect.

In *Labine* v. *Vincent*, 401 U.S. 532 (1971), the Supreme Court of the United States held by a 5-4 vote that a state law (Louisiana) barring an illegitimate child from inheriting from its father equally with legitimate children has a rational basis and does not violate the equal protection clause of the 14th Amendment. By a *per curiam* opinion joined in by seven of its members the same court in *Gomez* v. *Perez*, 409 U.S. 535 (1973), held that

Texas statutes giving legitimate children an enforceable right of support against the father but not extending the same right to illegitimate children were discriminatory and denied to illegitimate children the equal protection guaranteed by the 14th Amendment.

In *Gomez* no reference was made to *Labine*. It was observed, however, that in the areas of wrongful death and workmen's compensation it had been settled by previous decisions that "a State may not invidiously disciminate against illegitimate children by denying them substantial benefits accorded children generally." Cf. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1971). In *Weber*, *Labine* had been distinguished as follows:

"That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders . . . The Court has long accorded broad scope to state discretion in this area. Yet the substantial state interest in providing for "the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents,' Labine v. Vincent, 229 So 2d 449, 452 (La App 1969), is absent in the case at hand.

"Moreover, in Labine the intestate, unlike deceased in the present action, might easily have

modified his daughter's disfavored position [by will or by marriage to her mother] . . . The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them."

It is readily apparent that the meaning of the equal protection clause cannot be ascertained from what it says, nor even from what the Supreme Court has said about it. As in Regina v. Ojibway* a pony was found to be a small bird, so under the 14th Amendment an illegitimate child may either be a speckled bird or a jackass, depending on its current aspect as (and when) viewed by the keeper of the royal secrets of the Constitution. Indeed it appears that here is a corner of the world Alice in Wonderland would not find unfamiliar.

From time immemorial the law of this state has recognized and enforced the responsiblity of a father for the support of his illegitimate child, notwithstanding the vicissitudes of proof. Since it is now held by the court of last resort in the federal constitutional field that a child's right of support from its father is within the coverage of the equal protection clause and, if accorded to legitimate children in general, must be accorded to illegitimate children as well, it would be our inclination to hold that although a right of inheritance may not have

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the immediacy or social signifiance of a present need for support, yet a right is a right, the existence of which surely ought not to depend on whether it falls within the ambit of state-enforced welfare legislation. If a state cannot constitutionally force a father to support his children without including illegitimate children, we can find no justification in logic for its authority to deny illegitimate children the same right of inheritance conferred upon other children. Though the right has something of a fugitive nature in that the father may of course discriminate against any child, legitimate or illegitimate, it seems incongruous that the state should be allowed to do it for him. But after all, this is mere logic, which seems to have a declining importance in the world of constitutional jurisprudence.

We are equipped with neither a crystal ball nor the type of scales on which it is evident that a right must be weighed in order to determine whether it is heavy enough to register under the 14th Amendment. Nor are we willing to undertake the sophistry of distinguishing *Labine* v. *Vincent*, 401 U.S. 532 (1971). Suffice it to say that it has not been overruled by the court that has the exclusive power to overrule it, and we think that as long as it remains the law it governs this case.

The judgment is affirmed.

All concur except Lukowsky, J., not sitting.

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* * * * * * * *

APPENDIX B

FAYETTE CIRCUIT COURT

FIRST DIVISION

CECIL PENDLETON, ET AL., PLAINTIFFS,

VS: **OPINION** NO. 31840

BEE PENDLETON, ET AL., DEFENDANTS.

* * * * * * * *

The plaintiff suggests that paragraph 14 of his amended complaint raises issues which have not been heretofore disposed of by the Court. That portion of the amended complaint alleges that KRS 391.090(2) is unconstitutional to the extent that it permits an illegitimate child to inherit only through his mother. Plaintiff contends that the statute denies equal protection of the law to illegitimate children. The question was considered and decided adversely to the plaintiff's position by the Supreme Court in the recent case of *Labine* v. *Vincent,* 401 U.S. 532, 28 L. Ed. 2d 288, 91 S. Ct. 1017 (1971). In that case, the Supreme Court upheld the constitutionality of a Louisiana statute providing that an illegitimate child who had been acknowledged by the father could not inherit from the father in the case of intestacy.

On the basis of the decision in *Labine* v. *Vincent*, supra, it does not appear that paragraph 14 of the complaint states a claim upon which relief can be granted.

The Clerk will make this opinion a part of the record.

JUDGE, FIRST DIVISION

August 9, 1972

Copies to: Hon. Scotty Baesler
Hon. William C. Jacobs
Hon. Edward P. Roark
Hon. Phillip D. Scott

* * * * * * *

APPENDIX C

COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

CECIL PENDLETON, BY HIS NEXT FRIEND, WILLIAM F. GADD APPELLANT

VS: File No. F-313-72
Opinion Rendered, October 3, 1975
Appeal From Circuit Court Action No. 31840

BEE PENDLETON, ET AL APPELLEES

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellant their cost herein expended.

APPELLANT PETITION FOR REHEARING DENIED ---------- FEBRUARY 6, 1976.

/s/ Martha Layne Collins,
A Copy - Attest: Martha Layne Collins, Clerk

Issued February 6, 1976 By ..... D.C.

* * * * * * * *

COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

Cecil Pendleton

VS: File No. F-313-72
Opinion Rendered, October 3, 1975
Appeal From Fayette Circuit Court Action No. 31840

Bee Pendleton, et al

CORRECTED

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellant their cost herein expended.

APPELLANT PETITION FOR REHEARING DENIED — 2/6/76

/s/ Martha Layne Collins
A Copy - Attest: Martha Layne Collins, Clerk

Issued February 6, 1976 By ..... D.C.

* * * * * * * *

APPENDIX D

In the Supreme Court of the
Commonwealth of Kentucky

CECIL PENDLETON, Appellant,

v. No F-313-72

BEE PENDLETON, CALLIE
SHERROW PENNINGTON,
JACK PENDLETON,
W. G. PENDLETON,
MARATHON OIL COMPANY,
CARROLL G. COLE and
I. W. SMITH, and
QUALI CON, INC., Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Cecil Pendleton, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kentucky affirming by mandate issued February 6, 1976 the judgment of the Fayette Circuit Court upholding the validity of a state statute, to-wit: KRS 391.090(2), the validity of such statute having been drawn in question as being repugnant to the equal protection clause of the 14th Amendment to the Constitution of

the United States of America and such judgment here appealed from being in favor of validity.

This appeal is taken pursuant to 28 U.S.C.A. § 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript so much of the record as may hereafter be requested by Appellant under Rule 12 of the Rules of the Supreme Court of the United States.

III. The following question is presented by this appeal:

Does a state statute [KRS 391.090(2)] which prohibits an illegitimate child from inheriting from his intestate father violate the equal protection clause of the 14th Amendment to the United States Constitution where such statute permits illegitimates to inherit from their intestate mothers as legitimate children do?

/s/ William C. Jacobs
WILLIAM C. JACOBS
Attorney for Cecil Pendleton,
Appellant
602 Security Trust Building
Lexington, Kentucky 40507
Telephone: (606) 254-9086

PROOF OF SERVICE

I, William C. Jacobs, attorney of record for Cecil Pendleton, appellant herein, depose and say that on the 2nd day of April, 1976, I mailed by first class mail a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellees, Pendleton, by mailing same to their attorney of record Hon. Edward P. Roark, 207 Stanford Street, Lancaster, Kentucky 40444, to the Appellees, Carroll G. Cole and I. W. Smith by mailing same to their attorney of record Hon. Scotty Baesler, 307 West Short Street, Lexington, Kentucky 40507, to the Appellee, Marathon Oil Company, by mailing same to its attorney of record, Hon. Phillip Scott, 156 Market Street, Lexington, Kentucky 40507. Callie Sherrow Pennington and Quali Con, Inc. entered no appearance.

/s/ William C. Jacobs
WILLIAM C. JACOBS

STATE OF KENTUCKY)
) SCT:
COUNTY OF FAYETTE)

Subscribed and sworn to before me at Lexington, Kentucky on this the 2nd day of April, 1976.

My Commission expires:

/s/ Linda Pollitt
NOTARY PUBLIC

* * * * * * * *

APPENDIX D,

IN THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

CECIL PENDLETON — APPELLANT

V. — No. F-313-72

BEE PENDLETON, CALLIE SHERROW PENNINGTON, JACK PENDLETON, W. G. PENDLETON, MARATHON OIL COMPANY, CARROLL G. COLE and I. W. SMITH, and QUALI CON, INC. — APPELLEES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Cecil Pendleton, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kentucky affirming by mandate issued February 6, 1976 the judgment of the Fayette Circuit Court upholding the validity of a state statute, to-wit: KRS 391.090 (2), the validity of such statute having been drawn in question as being repugnant to the equal protection

clause of the 14th Amendment to the Constitution of the United States of America and such judgment here appealed from being in favor of validity.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript so much of the record as may hereafter be requested by Appellant under Rule 12 of the Rules of the Supreme Court of the United States.

III. The following question is presented by this appeal:

Does a state statute [KRS 391.090 (2)] which prohibits an illegitimate child from inheriting from his intestate father violate the equal protection clause of the 14th Amendment to the Constitution where such statute permits illegitimates to inherit from their intestate mothers as legitimate children do?

/s/ W. C. Jacobs
WILLIAM C. JACOBS
602 Security Trust Building
Lexington, Kentucky 40507
Telephone: (606) 254-9086

PROOF OF SERVICE

I, William C. Jacobs, attorney of record for Cecil Pendleton, appellant herein, depose and say that on the 3rd day of May, 1976, I mailed by first class mail a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellees, Pendleton, by mailing same to their attorney of record Hon. Edward P. Roark, 207 Stanford Street, Lancaster, Kentucky 40444, to the Appellees, Carroll G. Cole and I. W. Smith by mailing same to their attorney of record Hon. Scotty Baesler, 307 West Short Street, Lexington, Kentucky 40507, to the Appellee, Marathon Oil Company, by mailing same to its attorney of record, Hon. Phillip Scott, 156 Market Street, Lexington, Kentucky 40507. Callie Sherrow Pennington, not represented by counsel, was served with a true copy of the Notice by mailing same to her last known address at S. Campbell Street, Lancaster, Kentucky 40444. Quali Con, Inc., not represented by counsel, was served with a true copy of the Notice by mailing same to its registered agent, Mr. Charles E. Anness, at his last known address, Carolyn Lane West, Nicholasville, Kentucky 40356, thereby all parties required to be served have been served pursuant to Rule 33 of the Rules of the Supreme Court of the United States.

/s/ W. C. Jacobs
WILLIAM C. JACOBS
602 Security Trust Building
Lexington, Kentucky 40507
Telephone: (606) 254-9086

Attorney for Appellant

STATE OF KENTUCKY)
) SCT:
COUNTY OF FAYETTE)

The foregoing was subscribed and sworn to before me by WILLIAM C. JACOBS on this the 3rd day of May, 1976.

My Commission expires: May 7, 1976.

/s/ Linda Pollitt
Notary Public

* * * * * * *

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1610

CECIL PENDLETON, ... APPELLANT

VS:

BEE PENDLETON,
CALLIE SHERROW PENNINGTON,
JACK PENDLETON,
W. G. PENDLETON,
MARATHON OIL COMPANY,
CARROLL G. COLE,
I. W. SMITH, and
QUALI CON, INC., ... APPELLEES

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF KENTUCKY

MOTION AND RESPONSE TO JURISDICTIONAL STATEMENT

EDWARD P. ROARK
207 Stanford Street
Lancaster, Kentucky 40444

Attorney for Jack Pendleton, Appellee

PRINT MASTER INC., 845 Lane Allen Rd., P.O. Box 4183, Lexington, Ky. 40504, Ph. 277-5134

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1610

CECIL PENDLETON, ... APPELLANT

VS:

BEE PENDLETON,
CALLIE SHERROW PENNINGTON,
JACK PENDLETON,
W. G. PENDLETON,
MARATHON OIL COMPANY,
CARROLL G. COLE,
I. W. SMITH, and
QUALI CON, INC., ... APPELLEES

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF KENTUCKY

MOTION AND RESPONSE TO JURISDICTIONAL STATEMENT

MOTION

Comes Edward P. Roark, Attorney for Jack Pendleton on this Appeal (and who was also attorney for Bee Pendleton, now deceased, in the Supreme Court of Kentucky) and in response to Appellant's Jurisdictional Statement moves the Court under Supreme Court Rules, Rule 16, to

dismiss the appeal herein, or in the alternative, to affirm the decision of the Supreme Court of Kentucky, and in support of this motion he asserts and relies on the following grounds:

I. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED ON THIS APPEAL WAS NOT PROPERLY RAISED, OR EXPRESSLY PASSED ON IN THE LOWER COURT.

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

III. TWO OF THE APPELLEES NAMED ARE DECEASED AND NO ACTION HAS BEEN TAKEN BY APPELLANT TO REVIVE THE ACTION AGAINST THEIR REPRESENTATIVES OR HEIRS, SO THE APPELLEES NAMED ARE NOT THE REAL PARTIES IN INTEREST.

ARGUMENT

In support of the grounds listed, Appellee submits the following argument:

I. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED ON THIS APPEAL WAS NOT PROPERLY RAISED, OR EXPRESSLY PASSED ON IN THE LOWER COURT.

Appellant, in his attack on the constitutional validity of KRS 392.090(2) under the 14th Amendment to the Constitution assumes the position that if he procures a ruling that KRS

391.090(2) is unconstitutional and is invalidated he will then be entitled to the estate of his putative father under the provisions of KRS 391.010(1) even though he admittedly remains illegitimate. Such a position is untenable. He obviously overlooks the existing statutory and case law of Kentucky pertaining to inheritance by bastards.

Appellant has not attacked the validity of KRS 391.010(1), the Kentucky Descent and Distribution Statute. The pertinent part of KRS 391.010(1) reads:

> "When a person having right or title to any real estate of inheritance dies intestate as to such estate, it shall descend in common to his kindred, male and female, in the following order, except as otherwise provided in this chapter:
>
> (1) To his children and their descendants; if there are none, then - - -."

The Courts of Kentucky have consistently decided, KRS 391.090(2) notwithstanding, that under KRS 392.010(1) an illegitimate child has no right of inheritance in his father's estate. See *Croan* vs. *Phelps,* 94 Ky. 213, 21 SW 874; *Kimmel* vs. *Williams,* 217 Ky. 671, 290 SW 483; *Todd* vs. *Bowman,* 285 Ky. 117, 147 SW 2d 75.

The prevailing rule of construction for intestate succession by an illegitimate child is stated in 10 Am. Jur. 2d, Bastards, Sect. 149, wherein it states:

"Statutes which provide generally for the distribution of intestate property of a deceased person among certain classes of persons *without mentioning illegitimates, are construed to refer to legitimates only,* unless there is something in the language of the particular statute which indicates a different intention on the part of the legislature. The term *"child," "children"* and the like *in such statutes are ordinarily construed to mean legitimate child or children only,* unless other statutory language clearly imports the legislative intention to include such persons."

It would appear, therefore, that even if KRS 391.090(2) is declared unconstitutional and is thereby invalidated, Appellant would have no claim to legitimacy or a right of inheritance under KRS 391.020(1). Having made no attack on the constitutional validity of KRS 391.020(1) he has asserted no right under existing construction of the statute to the decedent's estate. Having stated no enforceable cause of action, his right of recovery was not properly raised or expressly passed on in the lower Court, and his appeal should be dismissed on this ground.

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This Court is on familiar grounds in dealing with the question of the constitutional validity of a state statute relative to the inheritance of intestate

property by an illegitimate child. In the case of *Labine* vs. *Vincent,* 401 U.S. 532, 28 L. Ed 2d 288, 91 S. Ct. 1017, decided as recently as 1971, (which is 5 years after the death of Cornelius Pendleton) this Court upheld the constitutionality of a Louisiana statute which provides that an illegitimate child who had been acknowledged by the father could not inherit from the father in the case of intestacy where there are other heirs.

In commenting on the law regarding the rights of illegitimate children in Louisiana, the Court reasoned,

"These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the state to make. The Federal Constitution does not give this Court the power to overturn the state's choice because the Justices of this Court believe they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature "discriminate" against illegitimates. But the rules also discriminate against collateral relations as opposed to ascendants, and against ascendants as opposed to descendants. - - - But the power to make rules to establish, protect, and strengthen the family life as well as to regulate the disposition of property left in Louisiana by a man dying there

> is committed by the Constitution of the United States and the people of Louisiana to the legislature of that state. Absent a specific constitutional guarantee, it is for that legislature, not life-tenured judges of this Court, to select from among possible laws."

The highest Court of Kentucky, considering the claim of an illegitimate child to inherit from his putative father and his raising the issue of the constitutionality of the descent and distribution statute of Kentucky in the case of *Richardson's Adm'r.* vs. *Borders,* 246 Ky. 303, 54 SW2d 676, held substantially the same in the *Labine* case by deciding,

> "The right to take property, either real or personal, by inheritance, is one created by law, and the Legislature, in the absence of constitutional limitations, has absolute power to say who shall inherit. Those named as heirs and distributees in the existing laws of descent and distribution have no vested rights until the intestate's death, and, as to them it necessarily follows that the Legislature may at will change the law governing the manner in which property shall descend and be distributed without affecting vested rights."

It is submitted by Appellees that the reasons for the decisions made in the *Labine* case are just as valid and controlling today as when rendered, so it appears that the appeal does not present a

substantial federal question that has not been recently considered.

III. TWO OF THE APPELLEES NAMED ARE DECEASED AND NO ACTION HAS BEEN TAKEN BY APPELLANT TO REVIVE THE ACTION AGAINST THEIR REPRESENTATIVES OR HEIRS, SO THE APPELLEES NAMED ARE NOT THE REAL PARTIES IN INTEREST.

By affidavit of counsel filed in the appendix as an exhibit hereto, it will be seen that two of the three heirs of Cornelius Pendleton, namely Callie Sherrow Pennington and Bee Pendleton are now deceased. They have been dead for more than six months, their estates have been settled and their executors have been discharged.

Inasmuch as both named parties have been deceased for more than six months, an Order should be entered declaring that this action is abated as to them under Supreme Court Rule 48.

Wherefore, Appellee, Jack Pendleton, respectfully asks this Court to dismiss the appeal, or, in the alternative, to affirm the decision of the Supreme Court of Kentucky.

Respectfully submitted,

EDWARD P. ROARK
207 Stanford Street
Lancaster, Kentucky 40444

Attorney for Jack Pendleton, Appellee

APPENDIX

APPENDIX

AFFIDAVIT OF EDWARD P. ROARK

Comes Edward P. Roark, being duly sworn, and states that he represented Bee Pendleton in the Court of Appeals of Kentucky (now Supreme Court of Kentucky) on the appeal of Cecil Pendleton, in action No. F-313-72, and he knew, also, Callie Sherrow Pennington; that Callie Sherrow Pennington died on January 3, 1970, and Bee Pendleton died on June 5, 1975; that the estates of both parties have been settled, a distribution of their assets been had, and the executors for both estates have been discharged.

Witness my signature this May 12, 1976.

Edward P. Roark

EDWARD P. ROARK

Subscribed and sworn to before me by Edward P. Roark, this May 12 1976.

Homer L. Pruitt
NOTARY PUBLIC

My commission expires 2-6-79.